IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 764.

ALBERT S. WILLIAMS, Commissioner of Finance of the State of Tennessee, L. D. SMITH, Attorney General of the State of Tennessee, and R. M. ATKINSON, District Attorney General,
Appellants,

vs.

THE TEXAS COMPANY,
Appellee.

On Appeal from the District Court of the United States for the Middle District of Tennessee.

REPLY BRIEF FOR THE TEXAS COMPANY.

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SUBJECT INDEX.

PAGE

The Act under Consideration 1

Brief 5

Argument 10

I. Right to Contract a Property Right. Act offends against Fourteenth Amendment to Constitution of United States 10

II. State cannot exercise the power of price fixing, unless business so affected is one that could be subjected to that power regardless of monopolies or contracts in restraint of trade 21

III. A State cannot, as a condition of admission of foreign corporations, require surrender of rights secured by Federal Constitution 26

IV. That part of the Act void that undertakes to prohibit discrimination as to prices of gasoline.... 33

V. Act void because it gives legislative power to Courts 36

VI. An Act void in part is wholly void 41

TABLE OF CASES CITED.

Adair v. United States, 208 U. S., 161.....5, 6, 11

Adams v. Tanner, 244 U. S., 590 ..... 7, 24

Alleyer v. Louisiana, 165 U. S., 578..... 5

Atkins v. Children's Hospital, 261 U. S., 535 ..... 5, 11

Barber v. Connelly, 113 U. S., 27..... 6

Brass v. Stoeser, 153 U. S., 391 .....7, 11, 22

Butcher Union Co. v. Crescent City Co., 111 U. S., 746 5

Brazee v. Michigan, 241 U. S., 340 11

Chicago M. & St. P. R. R. Co. v. Minnesota, 134 U. S., 418 ..... 8, 38

Connelly v. Union Sewer Pipe Co., 184 U. S., 540.... 6

In re: Cumberland Power Co., 147 Tenn., 504..... 8, 40

Cummings v. Trewhitt, 113 Tenn., 561 ..... 9, 42

PAGE

Dayton, etc., Co. v. Barton, 103 Tenn., 604 (Affirmed by this Court, 183 U. S., 13) 5
Employers' Liability Cases, 207 U. S., 463 ..... 9, 42
Fairmont Creamery Co. v. Minnesota, 274 U. S., 1 .....7, 8, 16, 24, 33
Frost Trucking Co. v. R. R. Commission, 271 U. S., 583 .....6, 9, 27
Gillespie v. People, 188 Ill., 176, 52 L. R. A., 283; 80 Am. St. Rep., 176 ..... 5, 6
Gulf, etc., Ry. v. Ellis, 165 U. S., 45 6
Hanover Ins. Co. v. Harding, 272 U. S., 494 ..... 9, 29
Harbison v. Knoxville Iron Co., 103 Tenn., 421 (Affirmed by this Court, 183 U. S., 13) 5
Kennard v. Louisiana, 2 Otto, 480 18
Lochner v. New York, 198 U. S., 45 .....5, 6, 11
Malone v. Williams, 118 Tenn., 390 9
Powell v. Pennsylvania, 127 U. S., 678 6
Power Co. v. Saunders, 274 U. S., 490 ..... 9, 30
Prentis v. Atlantic Coast Line, 211 U. S., 210 ..... 8, 39
Ribnik v. McBride, L. Co-op. Advance Sheet, June 15, 1928, page 614 .....6, 7, 8, 11, 17
State v. Julow, 129 Mo., 163; 50 Am. St. Rep., 443 .. 5
State v. Railroad, 124 Tenn., 1 6
Stratton v. Morris, 89 Tenn., 497 6
Terral v. Burke Construction Co., 257 U. S., 529.... 9
Trade Mark Cases, 100 U. S., 82 9
Tyson & Bro. v. Banton, 273 U. S., 418....6, 7, 8, 12, 23, 42
Vanzant v. Waddel, 2 Yerger, 259..... 6
Western Union Telegraph Co. v. Myatt, 98 Fed., 335. 8
Wolff Packing Co v. Court of Industrial Relations, 262 U. S., 522 .....6, 7, 8, 12
Constitution of Tennessee, Secs. 1 and 2..... 5

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The Act Under Consideration.

The Act of the legislature of the State of Tennessee which is now under consideration, is a rather long Act. It is not necessary to go to any great length in stating the features of it which precipitated the filing of this suit.

The purpose of the Act is fairly well stated in the caption, "to regulate the fixing and charging of prices of gasoline."

It is not particularly important to go into detail as to the method by which the price at which gasoline is to be sold is to be determined. It is sufficient to say that in Section 2, certain data and information in regard to the manufacture and sale of gasoline, and the cost incident to refining, freight rates, etc., shall be gathered.

The Division of Motors and Motor Fuels shall definitely fix the price at which gasoline shall be sold, wholesale and retail in the State of Tennessee, and shall also fix a proper differential between the wholesale and retail prices, and a permit shall be issued to sell, only on condition that the applicant will conform to these prices.

If the applicant is dissatisfied with the prices fixed by the Division of Finance and Taxation, the applicant may apply to the Commissioner of Finance and Taxation, in writing, setting forth the objections to the prices fixed by the division just mentioned, and is entitled to a hearing before the Commissioner, notice to be given to the representatives of the State. After the hearing, the Commissioner shall decide upon the question as to whether the prices originally fixed are proper, or not, and if not, shall fix the prices.

The Applicant may appeal from the finding of the Commission to the Chancery Court or the Circuit Court of Davidson County, Tennessee, where the action of the Commissioner will be reviewed upon the transcript of the evidence filed in the proceeding, and the Court to which the application is made may, in its discretion, either supersede or modify said order, in such manner and upon such conditions and terms as may appear to be proper.

The Act further makes it unlawful for any person or corporation engaged in selling gasoline, either wholesale or retail, to make any changes in the prices fixed without application to the Commissioner.

Under Section 8, it is provided that it shall be unlawful to grant any rebate to any purchaser, or to sell to any purchaser at a different price from that fixed as provided in

the statute. And further, that any person, firm, or corporation who violates any of the provisions of the Act, shall not be granted any permit to engage in the wholesale or retail sale of gasoline.

Section 8 of the Act contains this provision:

> "And it shall be unlawful for any person, firm or corporation engaged in intrastate wholesale or retail sale of gasoline in Tennessee, to discriminate against or in favor of any customer or purchaser of said dealer by selling at a different price to said purchasers in different localities in Tennessee, or to different purchasers in the same locality, provided the dealer may take into consideration the difference in freight rates to different localities."

The Act in question was attacked as being beyond the power of the legislature, upon three grounds:

It is beyond the power of the legislature of the State to pass a law under which it may, through its agencies fix the price at which gasoline may be sold in the State, either retail or wholesale, even though the transactions intended to be affected are purely intrastate.

Such a law violates the provisions of the Fourteenth Amendment to the Constitution of the United States, and particularly for the following reasons:

It deprives the producers and vendors of gasoline of their property without due process of law, and denies them the equal protection of the law. It violates Section 8 of Article 1 of the Constitution of the State of Tennessee, in that it takes the property of the producers and vendors of gasoline, said section providing that no man shall be "deprived of his life, liberty or property but by the judgment of his peers or the law of the land."

On an application for an injunction before three judges of the United States Court, Circuit Judge Moorman and

District Judge Gore and District Judge Hicks, a writ of injunction was issued, upon the ground that the Act of the legislature was unconstitutional because it deprived the plaintiff of its rights under the Fourteenth Amendment to the Constitution of the United States, and a decree was entered accordingly. From this decree, the defendants appealed to this court.

BRIEF.

Sections 1 and 2 of Article 2 of the Constitution of the State of Tennessee, provide as follows:

> "SECTION 1. The powers of the government shall be divided into three distinct departments, the legislative, executive, and judicial.
>
> "SECTION 2. No person or persons belonging to one of these departments shall exercise any powers properly belonging to either of the others, except in cases herein directed or permitted."

It is a well settled principle of law that every citizen has a free right to contract in regard to his services, or in regard to the sale and disposition of his property, upon such terms as he may see proper, provided that the business in which he is engaged is not one that has been recognized as exceptional.

It is further well established that this right to contract is "property" within the meaning of the constitutional provisions protecting the right of property, and may not be violated by legislative interference either by the States or by the Federal Government.

This property right is protected, as far as the State legislation is concerned, by the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, and by the land clause in Section 8, Article 1, of the Constitution of the State of Tennessee.

Alleyer v. *Louisiana*, 165 U. S., 578.
Butcher Union Co. v. *Crescent City Co.*, 111 U. S., 746.
Powell v. *Pennsylvania*, 127 U. S., 678.
Lochner v. *New York*, 198 U. S., 45.
Adair v. *United States*, 208 U. S., 161.
Atkins v. *Children's Hospital*, 261 U. S., 535.

Harbison v. *Knoxville Iron Co.*, 103 Tenn., 421.
(Affirmed by this Court, 183 U. S., 13.)
Dayton, etc., Co. v. *Barton*, 103 Tenn., 604.
(Affirmed by this Court, 183 U. S., 23.)
Gillespie v. *People*, 188 Ill., 176, 52 L. R. A., 283, 80 Am. St. Rep., 176.

State v. *Julow*, 129 Mo., 163; 50 Am. St. Rep., 443.

Under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and under Section 8 of Article 1 of the Constitution of the State of Tennessee, the legislature of the State is prohibited from passing any law that arbitrarily discriminates against the owners of one class of property in the use and disposition of it, or from passing any law that places burdens upon one class of property owners, either in the management or disposition of it, that are not placed upon the owners of all other classes of property, unless there is a sound and just reason for the discrimination, and this is always a matter for the Court to determine.

Barber v. *Connelly*, 113 U. S. 27.
Connelly v. *Union Sewer Pipe Co.*, 184 U. S. 540.
Gulf, etc., Ry. v. *Ellis*, 165 U. S., 150.
Lochner v. *New York*, 198 U. S., 45.
Adair v. *United States*, 208 U. S., 161.
Stratton v. *Morris*, 89 Tenn., 497.
State v. *Railroad*, 124 Tenn., 1.
Vanzant v. *Waddel*, 2 Yerger, 270.

The mere declaration in an Act that a business is affected with a public interest, does not prevent the Court from inquiring into that question, and really adds nothing to the force and effect of the Act.

Tyson & Bro. v. *Banton*, 273 U. S., 418.
Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S., 522.
Frost v. *Railroad Commission of California*, 271 U. S., 583.
Ribnik v. *McBride*, L. Co-op Adv. Sheets, U. S. Reports, June 15, 1928, p. 614.

There is no power in the legislature of the State to regulate the prices of commodities such as gasoline, or other commodities in trade or commerce in the State that justifies the exercise of the power undertaken to be exercised in the Act under consideration.

Wolff v. *Court of Industrial Relations*, 262 U. S., 522.
Tyson & Bro. v. *Banton*, 273 U. S., 418.
Fairmont Creamery Co. v. *Minnesota*, 274 U. S., 1.
Ribnik v. *McBride*, L. Co-Op. Adv. Sheets, June 15, 1928, p. 614.

The power of the State to fix the price of commodities, or to regulate the charge for services, must be determined by the character of business carried on. The mere fact that there may be unlawful agreements between certain parties conducting this business, violative of the anti-trust laws of the United States or of the State undertaking to exercise the power of price fixing, cannot affect the question.

Brass v. *Stoeser*, 153 U. S., 391.
Adams v. *Tanner*, 244 U. S., 590.
Tyson & Bro. v. *Banton*, 273 U. S., 418.
Fairmont Creamery Co. v. *Minnesota*, 274 U. S., 591.
Ribnik v. *McBride*, L. Co-Op. Advance Sheets, June 15, 1928, page 614.

Laying to one side business such as inn keepers, hackney coaches, and the like, regulated by the Parliament of England under the old common law, and laying to one side Public Utilities as generally understood in this country, operating under grants or franchises from the State or Federal Government, no power exists to regulate the prices charged in private business, save and except where the charge is made for a service, or use of property that has been dedicated to a public use by the owner, as in the case of grain elevators.

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S., 522.
Tyson & Bro. v. *Banton*, 273 U. S., 418.
Fairmont Creamery Co. v. *Minnesota*, 274 U. S., 1.

Ribnik v. *McBride*, L. Co-Op. Advance Sheets, June 15, 1928, page 614.

The Supreme Court of the United States in its recent cases, has interpreted and limited the grain elevator cases, and the case affirming the power of the State to fix the price of fire insurance, to the facts of these particular cases, and has declared that other business falling within the domain of private business, are not subject to such regulatory determination.

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S., 522.
Tyson & Bro. v. *Banton*, 273 U. S., 418.
Fairmont Creamery Co. v. *Minnesota*, 274 U. S., 1.
Ribnik v. *McBride*, L. Co-Op. Advance Sheets, June 15, 1928, p. 614.

For such abuses as monopolies and conspiracies in restraint of trade, the people are relegated under the later cases, to legislative acts prohibiting monopolies and agreements in restraint of trade, and the punishment for the violation of these acts.

Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S., 522.
Tyson & Bro. v. *Banton*, 273 U. S., 418.
Fairmont Creamery Co. v. *Minnesota*, 274 U. S., 1.
Ribnik v. *McBride*, L. Co-Op. Advance Sheets, June 15, 1928, p. 614.

The fixing of rates is a legislative matter and not a judicial matter, and the legislature of the State of Tennessee has no power to pass an Act conferring this power, either primarily or ultimately, upon the judicial branch of the government.

Western Union Telegraph Co. v. *Myatt*, 98 Fed., 335.
Chicago M. & St. P. R. R. Co. v. *Minnesota*, 134 U. S., 418.
Prentis v. *Atlantic Coast Line*, 211 U. S., 210.
In re: Cumberland Power Co., 147 Tenn., 504.

The State cannot exact from a corporation as a condition for receiving the privilege of doing business in the State, the submission to a statute that violates any right granted to the corporation by the Constitution of the United States.

Terral v. *Burke Construction Co.*, 257 U. S., 529.
Frost Trucking Co. v. *Railroad Commission*, 271 U. S., 583.
Hanover Ins. Co. v. *Harding*, 272 U. S., 494.
Power Co. v. *Saunders*, 274 U. S., 490.

Where a part of the Act offends against constitutional limitations, a Court will decline to enforce any part of the Act, unless it can clearly see that the legislature would have passed the Act without the unconstitutional provisions, or with those provisions omitted.

Trade Mark Cases, 100 U. S., 82.
Employers' Liability Cases, 207 U. S., 463.
Malone v. *Williams*, 118 Tenn., 390.
Cummings v. *Trewhitt*, 113 Tenn., 561.

ARGUMENT.

There are three reasons advanced by the appellants for the reversal of this case. They are these:

1. The business of selling gasoline is a business so affected with a public trust as to authorize the State to fix the price at which the gasoline is sold.

2. Even if, in the absence of the existence of a monopoly, there is no right in the State to fix prices at which gasoline is sold, yet where a monopoly exists, as is insisted in this case, the State has the power to fix prices.

3. As the plaintiff in this case is a foreign corporation, and cannot engage in intrastate business in Tennessee except by the permission of the State, it was the State's prerogative to prescribe as a condition of doing business in the State, submission to the terms of the Act authorizing the fixing of prices.

All three of these propositions are untenable. They will be discussed in their order.

I.

The right to contract is a property right, which, except in very exceptional cases, the legislature has no power to interfere with. To abridge this right is, except in the exceptional cases, a taking of property without due process of law, and therefore offends against the Fourteenth Amendment of the Constitution of the United States, and Section 8 Article 1, of the Constitution of the State of Tennessee.

It seems unnecessary to refer to cases supporting this elemental proposition. However, it may not be amiss to refer to *Allgeyer* v. *Louisiana*, 165 U. S., 578, where the principle was held to apply to the right of a citizen to make

a contract of insurance; to *Adair* v. *United States*, 208 U. S., 161, where the principle was applied to the right of a railroad to choose with whom it would make a contract of employment; to *Lochner* v. *New York*, 198 U. S., 45, where the principle was applied to the right of persons working in a bakery to contract for longer hours of service than the State statute permitted, and to the comparatively recent case of *Atkins* v. *Children's Hospital*, 261 U. S., 535, where the principle was applied with reference to an Act of Congress fixing the minimum wages for women. This Act was held unconstitutional under the Fifth Amendment of the Constitution of the United States.

It may also be observed that many businesses may be subjected, under the police power, to regulation and control as to the method and manner of operation, and yet not be subjected to legislative fixing of prices at which commodities handled in the business shall be sold.

This distinction is recognized and established by the decision of this Court in the case of *Ribnik* v. *McBride*, decided by this Court, May 28, 1928, where this Court said, after referring to and distinguishing between the case at bar and the case of *Brazee* v. *Michigan*, 241 U. S., 340:

> "And we since have held definitely that the power to require a license fee and to regulate the conduct of a business, is distinct from the power to fix prices. 'The latter power is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which business shall be carried on.'"

The cases in which the power of the legislature to fix prices exists are few, and cover a period of more than fifty years. The leading case is the case of *Munn* v. *Illinois*, 94 U. S., closely followed by the case of *Budd* v. *New York*, 143 U. S., *Brass* v. *North Dakota*, 153 U. S., and *German Industrial Insurance Company* v. *Lewis*, 233 U. S. The

later cases have restricted these cases, and this Court has refused to follow many of the general statements found in the earlier opinions. The later cases definitely determine that, except in emergencies, such as war, the legislature has no power to fix the price of commodities or services, where no *use* of the property is involved.

In the case of *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S., 522, in passing upon the power of the legislature to establish a system of wages, the Court said:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner, was clothed with such a public interest that the price of his produce or his wages could be fixed by State regulation. It is true that in the days of the early common law, an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a Colonial legislature sought to exercise the same power; but nowadays, one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.
>
> "An ordinary producer, manufacturer, or shop keeper, may sell or not sell as he likes. *United States* v. *Trans-Missouri Freight Association*, 166 U. S., 290, 320; *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S., 252, 256, and while this feature does not necessarily exclude business from the class clothed with a public interest, *German-Alliance Insurance Co.* v. *Lewis*, 233 U. S., 389, it usually distinguishes private from quasi-public occupations."

A clean-cut line of cleavage is drawn between the price one demands for service where property is devoted to a public use, and the price for commodities which are sold upon the public market.

The recent case of *Tyson & Bro.* v. *Banton*, 273 U. S., 418,

has attracted widespread attention. It has opened up again the question as to when the legislature could control or regulate the prices of commodities. This Court laid down the following fundamental principles:

1. The right of the owner to fix the price at which his property shall be sold or used is an inherent attribute of the property itself, and as such, is within the protection of the due process of law clause of the Fifth and Fourteenth Amendments.

2. The authority to regulate the conduct of a business, or acquire a license, comes from a branch of the police power, and it may be quite distinct from the power to fix prices.

3. The power to fix prices ordinarily does not exist in respect to merely private property.

4. A business is not affected with a public interest merely because it is large, or because the public is warranted in having a feeling of concern in respect to its maintenance.

5. A business is not affected with a public interest from the mere fact that the public derives beneficial accommodation or ease from the existence or operation of the business.

6. While the word "interest" in a business is not always so limited as strictly denoting "a right," that synonym more nearly than any other expresses the sense in which it is to be understood.

7. The mere declaration by the legislature that a particular kind of property or business is affected with a public interest is not conclusive upon the question of the validity of the regulation. The matter is always one open to judicial inquiry.

Referring to the Munn case, this Court said:

> "There is some general language in the opinion which, superficially, might seem broad enough to cover

cases like the present one. It was said, for example (p. 126), 'property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large.' Literally, that would include all the large industries, and some small ones; but in accordance with the well-settled rules, the words must be limited to the case under consideration."

It is then said:

"Indeed the language quoted is qualified immediately by the statement of the general rule that, 'when, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created.'

"The significant requirement is that the property shall be devoted to a use in which the public has an interest, which simply means, as in terms it is expressed at page 130, that it shall be devoted to 'a public use.' Stated in another form, a business or property, in order to be affected with a public interest, must be such, or be so employed, as to justify the conclusion that it has been devoted to a public use and its use thereby, in effect, granted to the public."

After discussing briefly the cases known as the rental law and the Adamson law, as being cases of emergency, and the later cases on that subject, it is said:

"Nor is the sale of ordinary commodities of trade affected with a public interest so as to justify legislative price fixing. This Court said in *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S., 537:

" 'It has never been supposed, since the adoption of the Constitution, that the business of the butcher or the baker, the tailor, the wood chopper, the mining operator or the miner, was clothed with such a public interest that the price of his product or his wages

could be fixed by State regulation. It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a Colonial legislature sought to exercise the same power; but nowadays, one does not devote one's property or business to a public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.' "

With this broad declaration, there was finally laid to rest the question that has been agitated ever since the case of *Munn* v. *Illinois*. But not satisfied with this conclusion, the opinion goes further. Reviewing Lord Hale's statement in regard to when private property is affected with a public interest, it was said:

"That this phrase was not intended by its author to include private undertakings like those enumerated in the statute now under consideration, is apparent when we consider the connection in which it was used. It occurs in Lord Hale's manuscript, *De Portibus Maris*, 1 Hargrave's Law Tracts, 78, in which the three-fold rights of the proprietor, the public and the King in ports are considered. It first is pointed out that no man can erect a public port without the King's license, though if he set up a port for his private advantage, he may take what rates he and his customers can agree upon. But it is said that if the King or the subject have a public wharf, to which all persons must come, because it is the wharf only licensed by the King, or there is no other wharf in that port, arbitrary and excessive charges cannot be made. For it is then affected with a public interest and ceases to be *juris privati* only; 'as if a man set out a street in a new building on his own land, it is now no longer a bare private interest, but it is affected with a public interest.'

"It is clear that, as there announced, the rule is confined to conveniences made public because of the privilege of maintaining them has been granted by govern-

ment, or because there has arisen what may be termed a constructive grant of the use to the public. That this is what Lord Hale had in mind is borne out, and the question now under discussion is illuminated by the illustration, which he evidently conceived to be pertinent, of a street opened to the public, in which case the assumed grant and resulting right of use is very apparent."

In two later cases the same position was taken, and legislative enactments declared contrary to the Fourteenth Amendment.

In the case of *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S., 1, in holding a Minnesota statute violative of the Fourteenth Amendment, it was said:

"It seems plain enough that the real evil supposed to threaten the cream business was the payment of excessive prices by powerful buyers for the purpose of destroying powerful competition. To prevent this, the statute undertook to require every buyer to adhere to a uniform price fixed by a single transaction.

"As the inhibition of the statute applies irrespective of motive, we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce but also as beneficial to the public. Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequent. Enforcement of the statute would amount to fixing the price at which plaintiff in error may buy, since one purchase would establish this for all points without regard to ordinary trade conditions.

"The real question comes to this: May this state, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public, and not shown now to be accompanied

by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse."

Later, in the case of *Ribnik* v. *McBride*, decided May 28, 1928, the same ruling was applied to a statute fixing the price of services of employment agencies.

By these specific cases, then, it is settled that a legislature may not fix wages; it may not limit the price at which theatre tickets may be sold; it may not fix the price of milk, cream, or butterfats, nor may it fix the rates to be charged by employment agencies.

The principles determined, however, are much broader than the particular cases. Each of these cases declares that in ordinary business, in buying and selling commodities, in rendering services disconnected with the use of property opened to the public, the legislature cannot determine the prices to be paid and received.

There is no reason why the price of gasoline should be fixed by legislative fiat, that does not apply to contracts in regard to all fuel, as coal; to bread, to clothing, to meat, to shelter. Unlimited by the reasoning of the recent cases, the power that it is insisted the Munn case sustains, could be carried into all business, when, in the judgment of the legislature, the businesses become affected with a public interest.

There is in the recent cases a clear and logical line of cleavage that may be followed with certainty.

The case of *Munn v. Illinois*, confined by these later cases to its facts, was decided in 1876. Up to that time, no Act of the State legislature that undertook to regulate the use of private property or the conduct of private business, or even

quasi-public business, had ever been declared invalid as in violation of the Fourteenth Amendment to the Constitution of the United States. In fact, that amendment had been invoked in a very few cases that found their way to this Court. The bench, as well as the bar, and the public at large, had rather vague and indefinite ideas as to the meaning of the Fourteenth Amendment. The first time it was invoked in a case that came to this Court was in the famous Slaughter House cases (16 Wall., 36). In these cases, Mr. Justice Miller said, after referring to the Thirteenth, Fourteenth and Fifteenth Amendments:

> "It is true that only the Fifteenth Amendment mentions the negro by speaking of his color and his slavery, but it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them, as the Fifteenth. We do not say that no one but the negro can share in this protection."

And further, in reference to the equal protection of the law clause of the Fourtenth Amendment, he said:

> "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class or account of their race, will ever be held to come within the purview of this provision."

This was within three years of the time when the case of *Munn* v. *Illinois* was decided.

The next case that we have been able to find was the case of *Kennard* v. *Louisiana*, decided December 1, 1875 (2 Otto, 480). In that case, the State of Louisiana had passed a statute which provided that "in any case in which a person may have been appointed to the office of judge of any Court in this State, and shall have been confirmed by the Senate and commissioned thereto . . . such commission shall be *prima facie* proof of the right of such person to immediately hold and exercise such office."

Section 2 provided, that if "any person, being an incum-

bent in office, shall refuse to vacate the same and turn the same over to the person so commissioned, such person so commissioned shall have the right to proceed by rule before the court of competent jurisdiction, to have himself declared to be entitled to such office, and inducted therein. Such rule shall be taken contradictorily with such incumbent, and shall be made returnable within twenty-four hours, and shall be tried immediately without jury, and by preference over all matters depending in such court; . . . and the judgment thereon shall be signed the same day of rendition."

The next section provided that if an appeal should be taken, it should be taken within one day after the rendition of the judgment, and was made returnable to the Supreme Court within two days.

This Act was attacked as being in violation of the Fourteenth Amendment, and the only question was that Kennard had been deprived of his office without due process of law.

This Court said:

> "It is substantially admitted by counsel in the argument that such is not the case, if it has been done 'in the due course of legal proceedings, according to the rules and forms which have been established for the protection of private rights.' We accept this as a sufficient definition of the term 'due process of law' for the purposes of the present case."

Then, after a review of the Act, the Court held that the Act did not violate the Fourteenth Amendment.

It appears, then, that the only effect of the Fourteenth Amendment considered in this case was that it entitled a citizen to have his property rights passed upon in due course of legal procedings according to those rules and forms which have been made for the protection of private rights.

Aside from the Happersett case (21 Wall., 162), deciding that the Fourteenth Amendment to the Constitution of the United States did not grant citizens the right to vote in a

State election as a privilege and immunity of citizenship, the only other case involving this amendment, prior to the Munn case, was another case similar to the Kennard case.

The first time that the clause was seriously considered, after the case of *Munn* v. *Illinois*, was the case of *Davidson* v. *New Orleans*, 96 U. S., 97, and the Court clearly indicated in that case, that just what the words "due process of law" meant, was not very clear, saying:

> "It must be confessed, however, that the constitutional meaning or value of the phrase, 'due process of law,' remains today without any satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights founded in the Constitution of the several States of the United States."

Mr. Justice Bradley, in a concurring opinion, says:

> "The article is a restraint on the legislative as well as the executive and judicial power of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by mere will," citing with approval *Murray's Lessee* v. *Hoboken Land Co.*, 18 Howard, 272.

He further says:

> "I think, therefore, we are entitled under the Fourteenth Amendment, not only to see that there is some process of law, but 'due process of law,' provided by the State law when a citizen is deprived of his property; and that in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive, and unjust, it may be declared to be 'not due process of law.' Such an examination may be made

without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular State may require."

All of this, then, justifies the statement that when the case of *Munn* v. *Illinois* was decided, no judge on the bench fully realized how far the Courts would go, in subsequent years, in restraining the legislatures of the States from passing laws affecting the use, disposition, and control of private property.

All of the later cases protecting the right of contract, and the management and control of business and use of property, have gone far beyond the conception of this Court at the time the case of *Munn* v. *Illinois* was decided. In many respects it may be argued that the decision in the Munn case was inconsistent with the later cases. It is dependent largely upon the doctrine of *stare decisis*, and the proposition that regulations in regard to big business should not be disturbed. But it cannot be decided in the case at bar to cover the right to deal with all the commodities of life.

This view of the decision of the case of *Munn* v. *Illinois* is sustained by the vigor of the dissenting opinions, and the increasing vigor of the dissents in subsequent cases, and is sustained by the recent cases refusing to carry the rule any further.

It is submitted that there is no power in the State legislature to fix the price of gasoline.

II.

The State cannot exercise an unconstitutional power, as the fixing of prices of commodities, unless the business so affected is one that could be subjected to that power, regardless of monopolies or contracts in restraint of trade.

Passing to the second proposition relied upon to sustain the Act—that is to say, that there is evidence of a monopoly, or unlawful agreements between The Texas Company, the Standard Oil Company, and other oil companies, which tend to create a monopoly, or, in other words, a combination in restraint of trade: It is said that the existence of such conditions vests the power in the State legislature to remedy these conditions by the exercise of the power of the price-fixing function.

It is denied that there is any evidence in the record as would justify the finding as a fact that conditions existed at the time of the passing of the Act as would justify the exercise of such extraordinary power in any event.

The question of fact will be discussed later.

The decisions of this Court clearly establish the proposition that 'the State cannot exercise an unconstitutional power, as the fixing of prices of commodities, unless the business so affected is one that could be subjected to that power, regardless of monopolies or contracts in restraint of trade.' To hold otherwise would make an act constitutional today, when a combination or monopoly existed, and unconstitutional tomorrow when a monopoly or combination in restraint of trade was broken up, and would punish the innocent as well as the guilty. The validity of the law in each case would be made to depend upon the determination of the issue of fact.

From a careful reading of the cases, where discussions of monopoly are embraced in the opinions, it is clear that what was said was that such conditions probably moved the legislature to action and explained the passage of this far-reaching legislation.

In the case of *Brass* v. *Stoeser*, 153 U. S., 391, the question was sharply raised as to whether or not the power to fix the price of the elevation of grain, which had been announced in the Munn case and the Budd case, was applicable

to the case at bar; and it was insisted for the owners of the elevators and the warehouses that the Munn case and the Budd case were decided as they were for the reason that a monopoly in the business existed, while no such situation arose in reference to the elevators in North Dakota.

It was held that such considerations were matters that were addressed only to the legislative discretion, and that:

> "When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and other circumstances."

In the case of *Tyson & Brother* v. *Banton*, 273 U. S., 418, it was said:

> "It is urged that the statutory provision under review may be upheld as an appropriate method of preventing fraud, extortion, collusive arrangements between management and those engaged in reselling tickets, and the like. That such evils exist in some degree in connection with the theatrical business and its ally, the ticket broker, is undoubtedly true, as it unfortunately is true in respect to the same or similar evils in other kinds of business. But evils to be suppressed or prevented by legislation which comports with the Constitution, and not by such as strikes down those essential rights of private property protected by that instrument against undue governmental interference. One vice of the contention is that the statute itself ignores the righteous distinction between guilt and innocence, since it applies wholly, irrespective of the existence of fraud, collusion, or extortion (if that word can have any legal significance as applied to transactions of the kind here dealt with) and fixes the resale price as well where the evils are absent as where they

are present. It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers also may be caught."

The opinion includes a quotation from the case of *Adams* v. *Tanner*, 244 U. S., 590, in reference to a statute of the State of Washington, penalizing the collection of fees for the securing of employment.

The same principle was affirmed in the later case of *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S., 1, as is shown in the quotation from that opinion on a former page of this brief.

The opinion quotes and affirms the principle of the case of *Adams* v. *Tanner*, 244 U. S., 590, referred to above.

In the very late case of *Ribnik* v. *McBride*, *supra*, the same principle was announced.

In the light of these cases, it seems well settled that the power of fixing prices for the sale of a commodity or for the use of property, must be determined by the character of the business legitimately determined; and that power cannot be exercised for the reason that a business otherwise free from legislative restriction happens to be involved in illegal combinations or collusive agreements between those who conduct it.

It may not be amiss here to discuss the facts in reference to the monopoly that it is insisted this record discloses.

The bill of the plaintiffs in this case, and the affidavits in support of it, aver that the plaintiff is an independent dealer, and not engaged in any combination or agreement or collusion with any other company; and, further, that there are a number of other companies in the United States and doing business in Tennessee, that are independent in every respect.

The record further discloses, that prior to the passage of this Act, and at the time it was passed, there were in Tennessee a number of independent oil dealers who had no connection with any of the companies like the Standard Oil Company or The Texas Company, or other larger oil companies doing business in the State, and that prior to the passage of this bill, the larger companies had reduced the price of gasoline to the consumer below the price that it had been in years in the State, and that had been charged by these independent dealers.

When these conditions arose, the independent dealers filed a bill in the Chancery Court of Rutherford County, Tennessee, seeking to enjoin the companies from reducing the price of gasoline to consumers, and compelling them to fix a differential between the wholesale price in tank car lots and the tank wagon price where gasoline was sold to the filling stations, and between the price as sold to filling stations from tank wagons and the price sold to consumers, in order that there should be a spread of prices that the independent dealers would be able to sell their gasoline to consumers at the profit fixed by these differentials. An injunction was granted and kept in effect for a number of months, until finally the bill was dismissed.

It is also clear from the record in this case, that the bill was passed not for the protection of the consumer, but for the purpose of providing these same differentials in price, and to hold the price of gasoline up to the consumer for the benefit of the middlemen.

These are some affirmative facts that appear in the record. To offset this, appellants set up in their answer, two ancient controversies between the people and the Standard Oil Company with which The Texas Company had no connection. The first was an effort on the part of the State of Tennessee to oust the Standard Oil Company of Kentucky from doing business in Tennessee, upon the ground that it was engaged in an effort to stifle competition. We are not interested in that lawsuit. One of the distinguished

counsel for appellants was the leading counsel for the State of Tennessee in that proceeding. He was successful in so far as the legal questions were concerned, and he ousted the Standard Oil Company of Kentucky from doing business in the State of Tennessee.

The other is the controversy between the United States and the Standard Oil Company, which was decided approximately fifteen or eighteen years ago. The Texas Company had no connection with that litigation.

In the light of the principle of law announced, and in the light of these facts, it is submitted that in so far as the monopoly is concerned, the validity of this statute is not helped in any degree by these allegations; and the statute still stands to be determined upon the fundamental question as to whether or not the State has the right to fix the price of gasoline, retail, wholesale, middlemen prices and all.

III

The third proposition that appellants rely on, is this: *That The Texas Company, as a foreign corporation qualified to do business within the State, must submit to the terms of this statute as a condition of remaining in the State; that the State has the right to grant, or refuse to grant, the privilege to The Texas Company and other foreign corporations to do an intrastate business within its borders and having this right, it may prescribe as a condition upon which the privilege is granted, that the corporation submits to a statute which provides that the price of its commodities may be fixed through legislative fiat.*

In the light of the more recent cases, particularly the case of *Terral* v. *Burke Construction Company*, 257 U. S., 529, it seems hardly necessary to discuss this question. It has been, certainly since that case, a settled principle, that while a State may or may not grant to a foreign corporation the right to do intrastate business within its borders,

and might prescribe certain conditions upon which such privilege should be granted, it could not, as one of the provisions, exact from the foreign corporation the surrender of any protection thrown around it by the Federal Constitution.

It would be an imposition upon this Court, and would appear as a vain effort at a display of learning to undertake a review of all the causes that were involved in the decision of the earlier cases up to the case of *Insurance Company* v. *Prewitt*, 202 U. S., 246. That case was overruled by the case of *Terral* v. *Burke Construction Company*, 257 U. S., 529, and in that case it was held that a State could not exact of a foreign corporation, as a condition for receiving permission to operate within the State, the surrender of the right to remove a case to the Federal Court, and said that right was conferred by the Federal Constitution, and that "state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all other of its sovereign powers, is subject to the limitations of the supreme fundamental law."

In the case of *Frost Trucking Company* v. *Railroad Commission of California*, 271 U. S., 583, where the State exacted of all corporations, foreign and domestic, that in order to receive a certificate of convenience to permit the operation of trucks upon the public highways, the corporation should become a common carrier, this Court said:

> "That, consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt, and is not brought into question here. It was expressly so decided in *Michigan Commission* v. *Duke*, 266 U. S., 570. . . . The naked question which we have to determine, therefore, is whether the State may bring about the same result by imposing the unconstitutional

requirement as a condition precedent to the enjoyment of a privilege which, without so deciding, we shall assume to be within the power of the State altogether to withhold if it sees fit to do so. Upon the answer to this question, the constitutionality of the statute now under review will depend.

"There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the State possesses; and the other—the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the State does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the Act here is an offer to the private carrier of a privilege, which the State may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.

"It would be a palpable incongruity to strike down an Act of State legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an Act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the State threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the State, having power to deny the privilege altogether, may grant it upon such

conditions as it sees fit to impose. But the power of the State in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

It is significant that in reaching that conclusion, reliance expressly was put upon the case of *Terral* v. *Burke Construction Company*, thus clearly showing that the same principle that applies to the right of a State in reference to corporations organized within its borders, also applies to that right in reference to domesticated corporations, in that State.

In the case of *Hanover Insurance Company* v. *Harding*, 272 U. S., 494, the principle was applied to a case where a foreign corporation questioned the validity of a tax, and the terms upon which the corporation was admitted to the State was that it agree to this tax. In holding the tax invalid, it was said:

"We do not think that the State must thus relieve itself from granting the equal protection of its laws to a foreign company which has met the conditions precedent to its becoming a quasi-domestic citizen. Of course at the end of the year for which the license has been granted, the State may, in its discretion, impose, as a condition precedent for a renewed license, past compliance with its valid laws; but that does not enable the State to make past compliance with Section 30 a condition precedent to a renewal of the license, if, as we find, that section violates the Fourteenth Amendment; for, as already said, while a State may forbid a foreign corporation to do business within its jurisdiction, or to continue it, it may not do so by imposing on a corporation a sacrifice of its constitutional rights."

In the very late case of *Power Company* v. *Saunders*, 274 U. S., 490, where a State statute provided that actions against domestic corporations must be brought in the county where it has a place of business or in which its chief officer resides, but permitted such actions, if against a foreign corporation, to be brought in any county of the State, endeavor was made to maintain the statute upon the ground that the defendant Power Company assented to the venue condition by seeking and obtaining permission to do business within the State.

This Court said:

> "The contention advanced by counsel for the plaintiff that the defendant impliedly assented to the venue provisions, is answered and refuted by repeated decisions holding that a foreign corporation by seeking and obtaining permission to do business in a State does not thereby become obligated to comply with or estopped from objecting to any provision in the State statutes which is in conflict with the Constitution of the United States."

These cases conclusively show that this position of appellants is unsound and untenable.

However, the Act itself is not directed against foreign corporations. It is directed against all persons and corporations, whether organized under the laws of the State of Tennessee or of any other State.

The caption of the Act, which is Chapter 22 of the Acts of 1927, is in part as follows:

> "AN ACT to regulate the gasoline industry; to regulate the fixing and charging of prices of gasoline, and prescribing a method for determining at what prices gasoline dealers may sell gasoline; to prohibit rebate and discrimination; to create and establish a division of the Department of Finance and Taxation to be known as the Division of Motors and Motor Fuels, fixing the duties of the Commissioner of Finance and

Taxation and of the Superintendent of such division with respect to the regulation of sale prices of gasoline; to provide for the issuance of permits to gasoline dealers under rules and regulations prescribed by the Division of Motors and Motor Fuels," etc.

In the body of the Act, after establishment of a Board to determine the price of gasoline, it says, at Section 4:

> "That every person, firm, or corporation, desiring to engage in the sale of gasoline in intrastate commerce in this State, either at wholesale or retail, shall make application to the Superintendent of the Division of Motors and Motor Fuels therefor, and shall be set out in said application the following information, to-wit:"

And at Section 6, it provides that it shall be unlawful "for any person, firm, or corporation engaged in selling gasoline in Tennessee," etc., to change the price without applying for permission.

Foreign corporations engaged in the business of selling gasoline, had already qualified to do business in the State. The statutes of the State make no reference to the qualification, further than the filing of a charter and the payment of fees.

The Act itself is directed to all persons, firms and corporations, and its validity must be determined by the principle that it is not directed at foreign corporations, or made a condition for the admission of foreign corporations. Directed against "all persons, firms, and corporations" it cannot be held valid as to foreign corporations and invalid as to others.

The Act Violates the Fourteenth Amendment to the Constitution of the United States, in that It Undertakes to protect the Middleman in the Gasoline Business, and Leave the Middleman of all Other Occupations Subject to the Inexorable Law of Commerce and Trade, and to the Advance of Modern Economic Conditions and Principles.

The middleman in the sale of gasoline does not serve a public purpose any more than the middleman in the sale of dry goods, or the sale of flour, or the sale of coal, or the sale of iron. The people as a whole are not very much interested in nurturing this particular class of middleman and leaving all others unprotected and unguarded. The modern system from manufacturer to retailer has become widespread, and saves millions of dollars to the consuming public each year.

The act in question is primarily intended for the protection of the middleman. The answer of the defendants to the Standard Oil Company case has as an exhibit the bill filed by the middlemen and independent oil companies against the oil companies now before this Court, and in that case, the Judge made an order, directing the plaintiffs in these cases to raise the price of gasoline to the consumer, in order to protect the middlemen, and one of the complainants in that case is the author of the Act now under consideration. It is the purpose of this legislation if possible to forge into law, by statute, the questionable power which the chancellor was asked in the case referred to to exercise, and which he did for a time exercise.

But it may be said by opposing counsel that it is necessary to protect the middleman to protect the public from extortionate prices. They may argue that but for the middleman, the consuming public would be at the mercy of the companies plaintiff in this case.

A complete reply to that is this: If the power to fix the price of gasoline exists at all, it exists for the benefit of the general public in the State, and to protect the ultimate purchaser; and the fixing of the price at which gasoline shall be sold to those who buy either in tank car lots or in small quantities, without regard to the middleman, will protect the public far better than an Act which undertakes to make a spread between all three prices and necessarily increase the cost of gasoline to the consuming public.

IV.

That part of the Act is void that undertakes to prohibit discrimination as to prices in sales of gasoline.

The Act provides as follows at Section 8:

> "And it shall be unlawful for any person, firm or corporation engaged in intrastate wholesale or retail sale of gasoline in Tennessee, to discriminate against or in favor of any customer or purchaser of said dealer by selling at a different price to said purchasers in different localities in Tennessee, or to different purchasers in the same locality, provided the dealer may take into consideration the difference in freight rates to different localities."

The theory of the appellant is that requiring the filing of all the information and the schedule of prices by the gasoline companies, even though the prices were fixed by the companies themselves, it would be unlawful, if Section 8 is preserved, to sell to any one person at any different price from that made to another customer. That is to say, that having sold gasoline to any one person at any price, in any part of the State of Tennessee, except from the consideration of freight conditions, is a fixing of the price of gasoline to all other persons in the same locality, and all other localities with similar freight rates.

It is submitted that if the Act should be stripped of the price-fixing power, and these provisions were permitted to stand, the Tennessee Act would be identical in principle and fact with the Act held unconstitutional by this Court in the case of *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S., 1.

An examination of the Act under consideration in that case shows that the following paragraph in the Minnesota law was under consideration:

> "Any person, firm, co-partnership or corporation en-

gaged in the business of buying milk, cream, or butterfat for manufacture or for sale of such milk, cream, or butterfat, who shall discriminate between different sections, localities, communities, or cities of this State, by purchasing such commodity at a higher price or rate in one locality than is paid for the same commodity by said person, firm, co-partnership or corporation in another locality, after making due allowance for the difference, if any, in the actual cost of transportation from the locality of purchase to the locality of manufacture or locality of sale of such milk, cream, or butterfat, shall be deemed guilty of unfair discrimination, and upon conviction thereof shall be punished by a fine of not exceeding one hundred dollars or by imprisonment in the county jail for not exceeding 90 days."

There is no distinction, in principle, between the section quoted from the Minnesota Act and the paragraph quoted from the Tennessee Act. In the one case, the price *paid* for a commodity was fixed by any one sale in a given locality or community. In the other case, the price *asked* for a commodity is fixed in identically the same manner.

In the Fairmont Creamery Company case this Court said:

"It seems plain enough that the real evil supposed to threaten the cream business was the payment of excessive prices by powerful buyers for the purpose of destroying powerful competition. To prevent this the statute undertook to require every buyer to adhere to a uniform price fixed by a single transaction.

"As the inhibition of the statute applies irrespective of motive, we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce but also as beneficial to the public. Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequence. Enforcement of the statute would amount to

fixing the price at which plaintiff in error may buy, since one purchase would establish this for all points without regard to ordinary trade conditions.

"The real question comes to this: May this State, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public, and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse."

Applying the principles of this quotation from the opinion of this Court to the case at bar, it is clear that if the State cannot directly fix the price of gasoline in Tennessee, then it cannot indirectly do the same thing by the method prescribed in Section 8 of the Act. To hold otherwise would be to affirm the exercise of the power which is declared to be the price-fixing power in the case of Fairmont Creamery Company while denying the power in the other portions of the Act.

Aside from any price-fixing power, there is no sound reason why gasoline should be sold in every part of the State of Tennessee at the same price it is sold in any other part of the State, the only difference being a consideration of freight rates. In the maintenance of small stations, the overhead expenses are such that it is not unreasonable, in outlying districts, to charge a greater sum than is charged in business centers where a greater volume of business makes a profit possible.

V.

The Act is Void Because it Gives Legislative Power to the Courts

When we take the Act as a whole, we find, as has been set out, that an appeal can be taken direct from the Commission fixing the price of gasoline, to the Chancery or Circuit Court of Davidson County, and the judges of those Courts are invested with the power not only to pass upon the question as to whether this rate is reasonable, as judges are accustomed to do, and affirm it or reject it, but the judges of these two Courts are authorized to modify it.

There can be no modification of an order fixing the price of gasoline, except to refuse to accept the rate fixed by the Commission and fix a new rate. This, then, is the power that is given to the Courts by the express language of the Act, and under the Act, when the judge fixes a new rate in lieu of the rate fixed by the Commission, it becomes the legal rate and binding upon all citizens of the State, both sellers and purchasers of gasoline. This is a legislative power that the legislature has undertaken to delegate to the judicial department of the government.

The proposition has long been well settled by the Courts of the country, that where the legislative and judicial departments of government are separated by the Constitution, a Court could not be empowered by the legislature to go into the rate-making business.

The Federal Courts, particularly, have adopted the rule, and followed it consistently. One of the clearest discussions of this question is found in the opinion of Hook, District Judge, in the case of *Western Union Telegraph Co.* v. *Myatt*, 98 Fed., 335. In that case, an act of the State of Kansas created what was known as a "Court of Visitation," and gave that Court not only the right in the first instance to make a rate, but afterwards to determine its reasonableness and pass upon that, thus combining within one body both the

legislative and judicial functions. This, Judge Hook held the legislature could not do. He held that under the Constitution of Kansas there were three separate and distinct branches of government created, the legislative, executive and judicial, and that where this was provided, no one department of the government could exercise any of the powers of the other.

The question then came up as to whether or not the Act embraced both legislative and judicial powers. The Court said:

> "The exercise by the State of the power to regulate the conduct of a business affected with a public interest, and to fix and determine as a rule for future observance, the rates and charges for services rendered is wholly a legislative or administrative function. The legislature may, in the first instance, prescribe such regulations and fix definitely the tariff of rates and charges; or, it may lawfully delegate the exercise of such powers, and frequently does, in matters of detail, to some administrative body of its own creation . . . But by whatever name such boards or bodies may be called, or by what authority they may be established or created, or however they may proceed in the performance of their duties, they are, in respect to the powers mentioned, engaged in the exercise of legislative or administrative functions as important in their character as any that are committed to the legislative branch of the government on the subject of property and property rights. In prescribing regulations or rules of action under the police power of the State for the safety and convenience of the public, or in determining a schedule of rates and charges for services to be rendered, they are in no sense performing judicial functions, nor are they in any respect judicial tribunals. The distinction between legislative and judicial functions is a vital one, and it is not subject to alteration or change either by legislative act or judicial decree, for such distinction inheres in the Constitution itself, and is as much a part of it as though it were definitely de-

fined therein. When the legislature has once acted, either by itself or through some supplemental and subordinate board or body, and has prescribed a tariff of rates and charges, then whether its action is violative of some constitutional safeguard or limitation is a judicial question the determination of which involves the exercise of judicial functions. The question is then beyond the province of legislative jurisdiction.

"As applied to this case, the power of the State to fix or limit the charges of telegraph companies for the transmission and delivery of telegraph messages, is a legislative one, but whether the rates so fixed or limited are reasonable to the extent that the enforcement of their operation would amount to the deprivation of the complainant of his property without due process of law and a denial of the equal protection of the laws, and therefore violative of the first section of the Fourteenth Amendment to the Constitution, is a question for the Courts. . . . It follows, therefore, as a corollary to this doctrine, that the Courts have no power to prescribe a schedule of rates and charges for persons engaged in a public or quasi-public service, because that is a legislative prerogative, and that the legislature has no power to forestall the judgment of the courts by declaring that a tariff or schedule prescribed by it is a finality, and thus prevent an inquiry into the reasonableness thereof by the Court in a controversy properly challenging such reasonableness. The legislative prerogative is the power to make the law, to prescribe the regulation or rule of action. The jurisdiction of the Courts is to construe and apply the law or regulation after it is made. The two functions are essentially and vitally different."

Judge Hook cited as authority, *Chicago M. & St. P. R. Co.* v. *Minnesota,* 134 U. S., 418, where the Court held that a statute of the State of Minnesota, as interpreted by the Supreme Court, vested in a Warehouse Commission the right not only to fix a rate but fix it finally, impaired the constitutional rights of the parties complaining who had a right to

have the Courts pass upon the reasonableness of the rate, and in the opinion of the Supreme Court of the United States drew a very sharp distinction between the rate-making power, as a legislative function, and the right of the Court to review that power on the ground that the constitutional right of some complaining party was impaired.

In the case of *Prentis* v. *Atlantic Coast Line Company*, 211 U. S., 210, the same principle was recognized under a different situation.

In that case, the Constitution of Virginia provided that there might be an appeal from the Commission that fixed railroad rates to the Court of Appeals of Virginia, and also provided that on such an appeal, the Court of Appeals of Virginia could not only set aside the rate, but could do exactly what the legislature of the State of Tennessee has authorized the Court to do in this case—modify or establish a rate which should be the legal rate.

The Supreme Court of the United States held that it was within the power of the State of Virginia to vest in its judicial branch of government, legislative functions if it desired to do so. Therefore, the Atlantic Coast Line had filed its bill attacking the rate fixed by the Commission too early, but should have appealed to the Court of Appeals and given that body an opportunity to fix the rate.

However, the Court recognized the proposition that the people of Virginia had vested legislative power in their judicial branch. But as Justice Holmes said:

> "We shall assume, as we have said, that when a State Constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder, so far as the Constitution of the United States is concerned. . . . We shall assume, as we have said, that some of the powers of the Commission are judicial, and we shall assume, without deciding, that if it was proceeding against the appellees to enforce this order and to punish them for a breach, it then would be sitting as

a Court and would be protected from interference on the part of the Courts of the United States.

"But we think it equally plain that the proceedings drawn in question here are legislative in their nature and none the less so that they have taken place with a body which, at another moment, or in its principal or dominant aspect, is a Court such as is meant by Section 720."

After further discussion in reference to the power of the Court of Appeals under the Virginia Constitution, the Court said, in speaking of its decision:

"We admit at once that they have not the same weight in this case. The question to be decided, we repeat, is legislative, whether a certain rule shall be made. Although the appeal is given as a right, it is not a remedy, properly so called. At that time, no case exists. We should hesitate to say, as a general rule, that a right to resort to the Courts would be made always to depend upon keeping a previous watch upon the bodies that make laws, and using every effort and all the machinery available to prevent unconstitutional laws from being passed."

And then the Court holds that if the rate should be affirmed by the Supreme Court of Appeals, the railroad would be at liberty to renew the application in the Circuit Court without fear of being met by the plea of *res adjudicata*.

The principle has been recognized by the Supreme Court of Tennessee in the case of *In re Cumberland Power Company*, 147 Tenn., 504. The identical principle was involved under Chapter 107 of the Acts of 1921, giving certain powers to the Railroad Commission of the State in regard to public utilities. It was provided as follows:

"That the State, any city, or other party aggrieved by any final finding, order, or judgment of the Commission, shall have the right, regardless of the amount involved, to appeal to the Supreme Court of Tennessee,

the same to be taken and perfected within sixty days from the date of such final finding, order or judgment, and that the Supreme Court may, on the petition of the Attorney General or any other party so aggrieved, if said petition be presented within sixty days from the date of the final finding, order or judgment of the Commission, award a writ of supersedeas upon requiring adequate suspension bond to any such final finding, order or judgment, and may renew, affirm, reverse, or *modify* the same as justice may require, and enter therein such order as may be right and just."

The Court in that case held that under the Constitution of the State of Tennessee, the powers of the government were divided into three branches, the legislative, executive, and the judicial branches; that the legislature could not vest legislative powers in the executive branch of the government, nor judicial powers in the legislative branch of the government; that the making of rates was wholly a legislative matter, and the judicial function was in passing upon their reasonableness; that the Railroad Commission was not a court, and could not exercise judicial functions except such quasi-judicial powers incidental to all legislative action. Therefore, that the Acts which provide an appeal from that body to the Supreme Court of the State was invalid, because every man was entitled to his day in court —the lower Court as well as the Appellate Court.

Now if the legislature of the State of Tennessee could not give judicial power to the Railroad Commission, it manifestly follows that it cannot give legislative power to the Chancery and Circuit Courts.

VI.

An Act Void in Part is Wholly Void

It is contended by the appellant, that notwithstanding the fact that it is beyond the power of the State to fix the price

of gasoline, yet there are certain portions of the Act that can still stand, upon the theory that the legislature would be presumed to have passed the provisions that are left even eliminating the ones that are held unconstitutional.

It is the general rule that where a part of the act is held unconstitutional, the Courts will declare the entire act unconstitutional, unless it can say that it is reasonable to suppose that the legislature would have passed the constitutional part, even though they had known that the remainder of the act would have to fall. This is supported by the Trade-Mark Cases, 100 U. S., 82; Employers' Liability Cases, 207 U. S., 463; *Malone* v. *Williams*, 118 Tenn., 390, and *Cummings* v. *Trewhitt*, 113 Tenn., 561.

It is submitted that it has been demonstrated in this brief that the following portions of the Act are unconstitutional:

(a) The general power to fix the price at which gasoline shall be sold.

(b) The indirect power to fix the price of gasoline by the prohibition of discriminations as provided in Section 8 of the Act.

(c) The power to discriminate in favor of middlemen in the gasoline industry, while not protecting the middlemen in other callings.

If these positions are sound, there is nothing left in the act but those portions of the act that require the filing of information and a schedule of charges with the Commissioner. Manifestly these portions of the act were put into the act solely for the purpose of carrying out the three powers or provisions in regard to price-fixing which have been mentioned above. This is clearly manifest from the caption of the act, which in part is as follows:

> "An Act to regulate the gasoline industry; to regulate the fixing and charging of prices of gasoline, and prescribing a method for determining at what prices

gasoline dealers may sell gasoline; to prohibit rebate and discrimination; to create and establish a division of the Department of Finance and Taxation," etc.

The act, stripped of the powers enumerated above, both direct and indirect authority, becomes an empty shell.

For all of these reasons, it is respectfully insisted that the judgment appealed from should be affirmed.

Respectfully submitted,

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